93-623

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

VALLEY FORGE INSURANCE CO.,
Petitioner,

v.

DARLENE STRICKLAND, Mother and Next Friend of TINA STRICKLAND, and DARLENE STRICKLAND, Individually,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court's standards for imposition of punitive damages and for review of punitive damages awards—whereby an award is disturbed only if it shocks the conscience—provide sufficiently definite and meaningful constraints on the fact-finder's discretion so as to satisfy the Due Process Clause of the Fourteenth Amendment.

2. Whether the excessive and arbitrary nature of the punitive damages award in this case violated Valley Forge's substantive due process rights.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 29.1 of the Rules of this Court, petitioner, Valley Forge Insurance Company, states that it is a wholly-owned subsidiary of Continental Casualty Company, which is a wholly-owned subsidiary of CNA Financial Corporation, a publicly traded corporation.

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CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV 2

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PETITION FOR A WRIT OF CERTIORARI

Valley Forge Insurance Company petitions for a writ of certiorari to review the decision of the Supreme Court of Mississippi.

OPINIONS BELOW

The decision of the Supreme Court of Mississippi (App., *infra*, 1a-15a) is reported at 620 So. 2d 535 (Miss. 1993). The judgment and opinion of the Chancery Court of Jackson County, Mississippi (App., *infra*, 16a-33a) is not reported. The ruling of the Supreme Court of Mississippi on the petition for rehearing (App., *infra*, 34a-35a) is not reported.

JURISDICTION

The decision of the Supreme Court of Mississippi was rendered on May 13, 1993. A petition for rehearing was denied on July 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property without due process of law. . . .

U.S. Const. amend. XIV.

STATEMENT

Fourteen months after it had made full payment to its insured on a claim, Valley Forge Insurance Company ("Valley Forge") was asked to waive subrogation rights to another insurer's $25,000 liability policy. On counsel's recommendation, Valley Forge commenced a declaratory judgment action concerning whether it or its insured was entitled to the policy proceeds. Before the Chancery Court of Jackson County, Mississippi, this relatively simple dispute over $25,000 transmogrified into an extraordinary, multi-million dollar insurance "bad faith" case, ultimately resulting in an award against Valley Forge of $1,000,000 in punitive damages and injunctive relief, to which the chancery court gave as an alternative the payment of an additional $1,000,000 in punitive damages. Although the punitive damages award was extreme and unprecedented, and although the Mississippi Supreme Court found that the result was reached by 'torturing the choice of law rules," App. *infra*, 7a, and undertaking "corrective measures . . . better left to the legislative branch," App., *infra*, 12a, the Mississippi Supreme Court affirmed the unconditional $1,000,000 punitive damages award.

1. On July 23, 1987, Tina Strickland, a Louisiana minor, suffered severe injuries in an automobile accident

in Mississippi while riding as a passenger in the car of her aunt, Vergie Aull, a Mississippi resident. TR26-28.[1] Tina's parents contacted a Louisiana lawyer to pursue insurance claims, including a claim under the binder for automobile liability coverage issued by Valley Forge to Tina's mother, Darlene Strickland. TR29-30. Valley Forge promptly investigated and paid its entire limits of uninsured motorist ($50,000) and medical payments ($5,000) coverage on October 9, 1987, approximately one month after it had received notice of the claim. TR94. Neither Valley Forge, Tina's father as her tutor under Louisiana law, nor Tina's lawyer sought court approval for the payment. TR 55; TR71.

The Stricklands also contacted Vergie Aull's automobile insurer, Nationwide Insurance Company ("Nationwide"), seeking to collect the $25,000 in liability limits. R832. A suit filed in June, 1988, in Louisiana state court by the Stricklands against Aull, Nationwide, and the other driver in the accident languished and ultimately was dismissed. R816-817. Although Nationwide acknowledged Aull's liability, it refused to make payment to Tina even after it was sued in Louisiana state court. Finally, on November 29, 1988—approximately fourteen months after Valley Forge had paid its limits in full—Nationwide agreed to pay Tina $25,000 on the condition that Valley Forge release any subrogation rights it might have to the Nationwide policy. Trial Ex. 10. Prior to this offer, Valley Forge had never even asserted subrogation rights with respect to the Nationwide policy (although upon paying Tina's claim, Valley Forge did have the Stricklands execute certain forms, including a subrogation receipt, as a matter of routine). TR94; Ex. 35 to Trial Ex. 4.

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[1] The record in the Supreme Court of Mississippi is cited herein as "R". The trial transcript page numbers are referred to as "TR——". Trial exhibits are referred to as "Trial Ex. ——". References to the trial transcript and trial exhibits are not otherwise paginated in the record.

Valley Forge referred the issue raised by Nationwide to outside counsel. R992. Upon counsel's recommendation, Valley Forge filed a declaratory judgment action in the Chancery Court of Jackson County, Mississippi, asking for a declaration as to whether Tina or Valley Forge was entitled to the proceeds of the Nationwide policy. R1-3; TR350.

2. In response to Valley Forge's declaratory judgment complaint, Strickland filed a counterclaim which asserted not only that Tina was entitled to the proceeds of the Nationwide policy, but that Valley Forge's prior $55,000 payment to Tina was a nullity because Valley Forge had failed to obtain court approval of the payment. Strickland further claimed that Valley Forge's acts "prior to and up through the instigation" of the declaratory action were in "bad faith" and in "total disregard of the rights of the minor child," and that Valley Forge had tortiously interfered with Tina's negotiations with Nationwide R22-34.

After a bench trial in which the evidence was directed primarily to Valley Forge's alleged practice of failing to obtain court approval of settlements of claims involving minors,[2] the chancellor ruled for Strickland. He first ordered Valley Forge to repay $55,000. The chancellor also ordered Valley Forge to pay interest at 8% on $25,000 (representing Nationwide's policy limits) from the date Nationwide first indicated it would make payment if Valley Forge would waive subrogation rights. Finally, the chancellor imposed a $2,000,000 punitive

[2] Although the chancellor's judgment included a finding that Valley Forge had a "long-established pattern" of failing to obtain court approval of minors' settlements, App., *infra*, 26a, only a single Valley Forge representative—the claims adjuster who handled the claim—testified at trial. Given her inexperience in handling uninsured motorist claims involving minors, she admitted she erred in failing to secure court approval of Valley Forge's $55,000 payment. TR71.

damages award, $1,000,000 payable immediately and the other $1,000,000 payable if Valley Forge within the prescribed time failed to (1) adopt a written corporate policy, approved in its minutes by its Board of Directors, requiring Valley Forge officers and employees to obtain approval of minors' settlements in Mississippi, which are not by law excused from court approval, (2) conduct training sessions on the issue of minors' settlements and applicable Mississippi law, (3) file with the chancery court and with the Insurance Commissioner of Mississippi evidence that it performed the required corporate acts, and (4) publish an advertisement in three consecutive Sunday editions of nine Mississippi daily newspapers, stating that Valley Forge, a member of the CNA Group of Insurance Companies, "has disclosed through sworn testimony of one of its representatives . . . that it has been the customary practice of C.N.A. companies, not to seek court approval of the settlement of minors' (children's) uninsured underinsured damages, at least in the states of Mississippi and Louisiana. . . ." App., *infra*, 31a.

Valley Forge filed a motion for new trial or in the alternative to alter or amend judgment arguing, among other things, that the punitive damages award violated the United States Constitution's Due Process Clause. R927A. The chancellor denied the motion without opinion. R1014-15.

3. On appeal, the Mississippi Supreme Court affirmed in part and reversed and rendered in part. Specifically, even though the chancery court had emphasized Valley Forge's purported practice of failing to obtain court approval of minors' settlements, the Mississippi Supreme Court reversed the conditional $1,000,000 punitive damages award because it did "not consider the conduct related to the [failure to obtain court approval of the] settlement in Louisiana sufficiently culpable to justify

punitive damages." [3] App., *infra*, 12a-13a. Nevertheless, the Mississippi Supreme Court also found that Valley Forge's subsequent conduct in Mississippi, though not technically "bad faith," involved "gross negligence in filing and maintaining a groundless lawsuit," and permitted the unconditional $1,000,000 punitive damages award to stand. App., *infra*, 9a-10a. In rejecting Valley Forge's argument that the punitive damages award was excessive, the Mississippi Supreme Court stated that:

> The $1,000,000 amount awarded unconditionally below is not shocking to the conscience of the Court. In fact, the 1.5% of net worth awarded here is proportionally lower than in other similar cases. *See e.g., Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172 (Miss. 1990) (5¼ per cent of net worth affirmed). Given the egregiousness of Valley Forge's conduct in holding up Tina's recovery for her injuries, as well as the serious actual damages suffered, it cannot be said that this award was so excessive as to evidence passion, bias or prejudice on the part of the chancellor.

App., *infra*, 11a. The Mississippi Supreme Court rejected Valley Forge's constitutional challenge to the punitive damages award without analysis, relying on *Ivy v. General Motors Acceptance Corp.*, 612 So. 2d 1108 (Miss. 1992). App., *infra*, 13a.

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[3] Though the conditional $1,000,000 punitive damages award obviously related to Valley Forge's failure to secure court approval of its payment in full to Tina given the alternative injunctive relief, in the portion of the judgment awarding punitive damages the chancellor intertwined references to both Valley Forge's purported historical practice of failing to obtain court approval of minors' settlements and its filing of the declaratory judgment action on subrogation as "the willful and wanton conduct" warranting imposition of punitive damages. App., *infra*, 26a-28a. Contrary to the Mississippi Supreme Court's apparent belief, App., *infra*, 10a, the judgment did not apportion the punitive award between the conduct. *See infra* note 8.

REASONS FOR GRANTING THE PETITION

The decision of the Mississippi Supreme Court in this case denied Valley Forge due process because the procedures which gave rise to the $1,000,000 punitive damages award did not include adequate safeguards satisfying the Fourteenth Amendment, such as those approved by the Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). Moreover, the decision approved an award so excessive in relation to Valley Forge's conduct and the harm caused thereby—different conduct and different harm than upon which the chancery court had based its award, *see infra* p. 20—that it constituted an arbitrary deprivation of property without due process. The Mississippi Supreme Court's decision conflicts with this Court's statements on the appropriate constraints on the fact-finder's discretion in imposing punitive damages. This Court's review is necessary to resolve the conflict and to articulate further the appropriate procedures necessary to ensure that punitive damages awards comport with the Due Process Clause.

1. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), and *TXO Production Corp. v. Alliance Resources Corp.*, —— U.S. ——, 113 S. Ct. 2711 (1993), make clear that the Due Process Clause of the Fourteenth Amendment imposes limits on punitive damages awards. *Haslip*, 111 S. Ct. 1032, 1043; *TXO*, 113 S. Ct. 2711, 2718 (plurality opinion), 2725 (Kennedy, J., concurring), 2731 (O'Connor, J., dissenting). Although there is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable . . . general concerns of reasonableness . . . enter into the constitutional calculus," *Haslip*, 111 S. Ct. at 1043, and dictate that there be "meaningful constraints" on a fact-finder's discretion, *id.* at 1045. The principle enunciated in *Haslip* predictably leads to the question of what constraints are meaningful, or whether a scheme with features other than those approved in *Haslip*

similarly suffices. *See Haslip*, 111 S. Ct. 1032, 1046-47 (Scalia, J., concurring). Those important questions are now raised by this petition: do standards for imposition and appellate review of punitive damages awards that turn not on well-defined, objective criteria as in *Haslip*, but rather merely on whether the fact-finder's or reviewing court's conscience is shocked, provide definite and meaningful constraints on the fact-finder's discretion in awarding punitive damages sufficient to satisfy the Constitution's requirements of due process?

In *Haslip*, the Court emphasized that Alabama's three tiers of procedural safeguards—jury instructions on the nature and purpose of punitive damages, trial court review on the record applying specific criteria, and appellate review, also applying specific criteria—were sufficient to satisfy due process requirements. The "full panoply of Alabama's procedural protections," 111 S. Ct. at 1046, limited the fact finder's discretion and reduced the risk that punitive damages were based on passion or prejudice. Integral to the Court's decision was the appelate review exercised by the Alabama Supreme Court: in determining whether a particular award was excessive, the Alabama Supreme Court undertook a comparative analysis of punitive damages awards, and then applied seven detailed substantive standards aimed at ensuring that the award was reasonable, was not in excess of an amount necessary to accomplish society's goals of punishment and deterrence, and possessed some understandable relationship to the compensatory damages. *Haslip*, 111 S. Ct. at 1045. Importantly, the Court found that appellate review had "real effect" in practice, resulting in reduction of punitive awards. *Id.*

In contrast, no clear standards assist fact-finders in imposing punitive damages in Mississippi. Once punitive damages are deemed appropriate, the fact-finder simply considers the purpose of punitive damages—to punish and deter—in the context of the defendant's net worth,

without further guidance on how to achieve those goals or on other objective factors relevant to the determination of the amount. *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985), *aff'd on other grounds*, 486 U.S. 71 (1988); *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1190 (Miss. 1990). Because of the vagueness of the "punish and deter" standards, a party's financial position, as the only objectively quantifiable criterion, can take on exaggerated importance. Indeed, in Mississippi, awards have been deemed arbitrary because the defendant's net worth and financial condition were not shown. *See First American Nat'l Bank v. Mitchell*, 359 So. 2d 1376, 1381 (Miss. 1978); *Mutual Life Ins. Co. v. Estate of Wesson*, 517 So. 2d 521, 539 (Miss. 1987) (Anderson, J., dissenting), *cert. denied*, 486 U.S. 1043 (1988) ("[C]onsideration of proportionality [between punitive and actual damages] rather than net worth is error."). This exaggerated importance of the consideration of net worth creates the potential for bias against unsympathetic but wealthy litigants. Introducing the defendant's wealth into the calculus "increase[s] the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." *TXO*, 113 S. Ct. at 2723. Courts must recognize this danger, and not permit it to dictate punitive damages awards. *See TXO*, 113 S. Ct. at 2738 (O'Connor, J., dissenting). The Court in *Haslip* took comfort that the fact-finder there was "guided by more than the defendant's net worth," evidence of the defendant's wealth having been excluded at trial. 111 S. Ct. at 1045. Net worth, however, appears to be the only guidepost upon which fact-finders can rely safely in Mississippi.

Because it is difficult to determine whether a standard has been violated when it is not readily discernible what that standard provides, the absence of guidelines and constraints concerning punitive awards are felt acutely at

the appellate level. The Mississippi Supreme Court will disturb a punitive damages award "only where it is so excessive that it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience of the court." App., *infra*, 11a; *Crenshaw*, 483 So. 2d at 278. The Mississippi Supreme Court has never clearly articulated what shocks its conscience; on the contrary the standards governing punitive damages awards being vague, it admits that it "necessarily" has no "hard and fast rules" to determine when a punitive damages award is excessive. App., *infra*, 11a; *Crenshaw*, 483 So. 2d at 278. The best that the court offers is a simple yet circular restatement of the goals of punishment and deterrence in the context of the defendant's net worth, and the obscure comment that it is the "judicial conscience," rather than the actual conscience of the members of the Mississippi Supreme Court, that must be shocked. *Crenshaw*, 483 So. 2d at 278.

Given the overall absence of objective criteria for evaluating punitive awards, the test for excessiveness on appeal under Mississippi law often becomes a simple mathematical inquiry based on the defendant's wealth. In this case, the Mississippi Supreme Court found that its conscience was soothed because the award was only 1.5% of Valley Forge's net worth, proportionately lower than in "similar" cases (without analyzing whether those cases in fact involved comparable torts or comparable harm). App., *infra*, 11a; *see also*, *Crenshaw*, 483 So. 2d at 279 ("[I]t is difficult to imagine that . . . the judicial conscience could be shocked by a punitive damage assessment which is less than 1% of the financial net worth of the defendant."). The implication of these cases is that an award should not be disturbed if it does not exceed a certain level of proportionality to the defendant's net worth, without regard to the specific conduct or harm (and thus the need to "punish and deter") involved in the case.

Like the standards which govern the fact-finder's imposition of punitive damages, Mississippi's appellate review is devoid of specific, objective criteria by which to evaluate punitive damages awards. Simply stating that a particular punitive damages award "shocks the conscience" begs the quesiton of why it does so. *See TXO*, 113 S. Ct. at 2725 (Kennedy, J., concurring). To eliminate arbitrariness and unpredictability, specific principled criteria—for example, the award's numerical relation to the compensatory damages, the nature of the existing or potential harm, the nature of the conduct, the profit to the malefactor, the culpability of the defendant, comparable awards in comparable circumstances, legislatively designated penalties, and the like, *see Haslip*, 111 S. Ct. at 1045; *TXO*, 113 S. Ct. at 2719—should guide the fact-finder in imposing the award and the appellate court in reviewing it, and lay the foundation for the ultimate conclusion that an award "shocks the conscience." Without such criteria:

> A reviewing court . . . comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints . . . could become as fickle as the process it is designed to superintend. Furthermore, it might give the illusion of judicial certainty where none in fact exists, and in doing so, discourage legislative intervention that might prevent unjust awards.

TXO, 113 S. Ct. at 2725 (Kennedy, J., concurring).

That Mississippi's system lacks the dimension of rigorous, objective appellate review has been widely recognized. The Court in *Haslip* observed that Mississippi's system differed significantly from Alabama's scheme; in fact, the seven detailed substantive standards [4] guiding

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[4] The Alabama Supreme Court examines: "(a) whether there is a reasonable relationship between the punitive damages award and

appellate review of punitive awards ". . . distinguishe[d] Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), and in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988)." *Haslip*, 111 S. Ct. at 1045, n.10 (parallel citations omitted). Some appellate courts have read the Court's comment in *Haslip* as a direct rejection of the Mississippi and Vermont systems and of other schemes exhibiting the same infirmities. *See, e.g., Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 105 (4th Cir. 1991) (in invalidating South Carolina's scheme for awarding punitive damages, the Fourth Circuit stated, "while the Supreme Court in *Haslip* did not say as much, the inference is left that the broad discretion given juries under the laws of Vermont and Mississippi is not adequately checked by court review based on a standard of excessiveness. The same inference is applicable to the South Carolina scheme. . . ."). Indeed, the Mississippi Supreme Court itself acknowledged that this Court "footnoted its belief that Mississippi's system is—more likely than not—unconstitutional" because, among other things, "a substantive and comparative 'check' is not conducted by the Mississippi Supreme Court." *Ivy v. General Motors Acceptance Corp.*, 612 So. 2d 1108, 1116 (Miss. 1992).

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the harm likely to result from the defendant's conduct as well as the harm that has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation." *Haslip*, 111 S. Ct. at 1045.

Appellate review of punitive awards is the last and perhaps the best means of "discern[ing] impermissible influences and guarantee[ing] constitutional results." *TXO*, 113 S. Ct. at 2742 (O'Connor, J., dissenting). Where the punitive damages are imposed by the judge, as was the case here, the need for rigorous appellate review is even more acute as it is the sole opportunity for the award to be evaluated by someone other than the fact-finder who imposed it. While judges ordinarily are thought better able to detect "impermissible influences" than juries, they too are not immune from bias and prejudice. *Talbot & Higgins Lumber Co. v. McLeod Lumber Co.*, 147 Miss. 186, 113 So. 433, 440 (1927) (Ethridge, J., dissenting) ("A chancellor, of course, is like other men, subject to the same imperfections that every man is subject to. He has his prejudices and is unable to rise above them completely, and these prejudices will evidently be felt and seen in the decree, although he is unconscious thereof."). For the reviewing court simply to contemplate the award in light of the malleable goals of punitive damages and in the context of the defendant's net worth provides no meaningful constraint on fact-finder discretion at perhaps the most critical procedural juncture; it effectively permits a court to "disregard the post-trial review required by due process at whim or will so long as [it does] not deny its necessity openly or altogether." *TXO*, 113 S. Ct. at 2742 (O'Connor, J., dissenting).

In application, decisions of the Mississippi Supreme Court demonstrate its failure to evaluate punitive awards without meaningful inquiry based on identifiable criteria and its willingness to ratify the fact-finder's decision without inquiry. The operative factor in Mississippi's scheme of appellate review is complete deference to the fact-finder. *Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414, 1417 (5th Cir. 1990) (Jones, J., *dissenting from denial of petition for reh'g en banc*), *cert. granted and judgment vacated*, 111 S. Ct. 1298 (1991) ("Mis-

sissippi courts all but refuse to interfere with the amounts of punitive damages assessed by the fact finder."). There has been only a single instance where the Mississippi Supreme Court reduced a significant punitive damages award because it was so excessive as to "shock the conscience," *Estate of Wesson*, 517 So. 2d at 533, and even then, the court did not elaborate on the basis for its reduction.[5] Unlike the Alabama Supreme Court's review approved in *Haslip*, appellate review in Mississippi has no "real effect" in practice.

This case vividly illustrates the flaws of Mississippi's system. Based on the testimony of a single adjuster, the chancellor made far-reaching findings concerning Valley Forge's alleged pattern and practice of failing to obtain court approval of settlements of minors' claims[6] and concerning Valley Forge's state of mind. On the basis of these conclusions, the chancellor then fashioned relief, including punitive damages, designed to make a public proclamation on the importance of court approval of settlements with minors and to achieve goals "better left to the legislative branch." App., *infra*, 12a. Nothing constrained the fact-finder's discretion to fashion such relief at the trial court level. The full panoply of procedural protections in this case consisted solely of a cursory review by the Mississippi Supreme Court under a deferential standard for excessiveness. Applying a mathematical formula, it declared that its judicial conscience was not shocked. Overly deferential review of the fact-finder's decision—one which rejects the award only if it shocks the

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[5] Punitive damages awards have been reduced or invalidated in Mississippi based on improper fact-finding at the trial level. *See Snowden v. Osborne*, 269 So. 2d 858, 861 (Miss. 1972). This is not the same as finding that the punitive damages award is so excessive as to shock the conscience.

[6] As discussed, *infra* p. 20, the Mississippi Supreme Court deemed Valley Forge's failure to obtain court approval of its payment to Tina Strickland an "oversight." App., *infra* 6a.

conscience without reference to fixed, objective criteria—is too elastic a restraint to provide meaningful protection against punitive damages awards that are the product of bias, passion, or prejudice or are otherwise without reasonable basis.

After *Haslip*, states began modifying their schemes of awarding punitive damages to comport with the Court's ruling. *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1417 (4th Cir. 1992) (*en banc*). For example, West Virginia dropped its deferential appellate review standard pursuant to which punitive damages awards were overturned only if they were the subject to "passion or prejudice" or were so excessive as to "shock the conscience." *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897, 908 (1991). Other states chose to adopt the standards approved in *Haslip*. *See, e.g., Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350, 354 (1991).

Despite the due process concerns about Mississippi's punitive damages scheme noted by this Court, *see Haslip*, 111 S. Ct. at 1045, n.10, and *Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring), Mississippi has not revisited its common-law scheme for awarding punitive damages. This is somewhat surprising because even before *Haslip*, the Mississippi Supreme Court itself recognized that:

> It is imperative that some parameters be developed for the guidance of juries and courts fixing the amount of punitive damages. The present undefined and open-ended status breeds disrespect for the law and for the courts and cannot be defended in reasoned debate. Standards need to be developed which will result in reasonable similar consequences, given reasonably similar circumstances. This objective has not been seriously addressed by this Court, and by few in the nation. It is a legitimate judicial undertaking, and should be accomplished by finding a just resolution of the several cases that come before us,

> one at a time. When enough cases have been decided the rules shall have emerged.

Harvey-Latham Real Estate v. Underwriters at Lloyd's, 574 So. 2d 13, 17 (Miss. 1990).

Harvey-Latham held out the promise that the Mississippi Supreme Court would develop standards to guide fact-finders and to guide itself in its appellate review of punitive damages awards; that promise has proved to be a false one. *Cf. TXO*, 113 S. Ct. at 2728 (O'Connor, J., dissenting). Relying on *Ivy v. General Motors Acceptance Corp.*, 612 So. 2d 1108 (Miss. 1992), the Mississippi Supreme Court in this case concluded without analysis that Mississippi's existing procedures for awarding punitive damages are not unconstitutional. App., *infra*, 13a.

In *Ivy*, the Mississippi Supreme Court summarily rejected all constitutional challenges to its punitive damages scheme by relying on a pre-*Haslip* decision, *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172 (Miss. 1990), which purportedly "meticulously explained that the judge or jury's discretion *is* limited or confined" and that the Mississippi Supreme Court indeed "provided a substantive and comparative 'check' on the amount which the jury awarded the plaintiff." 612 So. 2d at 1116.[7] The holding of *Ivy*, however, itself underscores the failings of Mississippi's scheme for punitive damages: one panel of the Mississippi Supreme Court, in *Harvey-Latham* (decided after *Andrew Jackson*), believes standards limiting punitive damages are lacking, while another panel, in *Ivy* (relying on *Andrew Jackson*) believes the standards in Mississippi, including appellate review, adequately constrain fact-finder discretion.

In *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991), after the United States Supreme Court

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[7] *Andrew Jackson* could not have provided guidance to the chancellor in this case because the judgment pre-dated that decision.

granted certiorari and remanded the case in light of *Haslip*, the Fifth Circuit critically analyzed Mississippi's scheme for awarding punitive damages, rejecting a constitutional challenge based on due process grounds. Finding that *Haslip* required analyzing whether the award is reasonable in light of the circumstances of the case and whether the procedures used in assessing the award imposed a sufficiently definite constraint, the Fifth Circuit approved a $500,000 punitive damages award primarily because the District Court Judge exhaustively examined the deterrent and retributive effects of the award, and applied many of the objective "substantive standards" that this Court approved in its review of the Alabama procedures in *Haslip*. 934 F.2d at 1386. *Eichenseer*, however, did not give blanket approval to Mississippi procedures. Indeed, the court expressly stated that there might be cases where Mississippi's vague guidelines and deferential standard of review would not act as an adequate check on the discretion of the fact-finder. *Id.*

This is such a case. Here, the only procedural safeguard to ensure that the punitive damages award was not an impulsive reaction to Valley Forge's net worth was the Mississippi Supreme Court's review. The chancellor made no detailed, substantive findings on the record premised on objective criteria. On the contrary, he simply catalogued Valley Forge's wrongs,[8] invoked the talismanic

[8] The Supreme Court of Mississippi found that the chancellor improperly deemed one aspect of Valley Forge's conduct worthy of punitive damages. It nevertheless decided to apportion the punitive damages, determining that "the chancellor awarded $1,000,000 in punitive damages unconditionally based on Valley Forge's assertion of subrogation rights and another contingent $1,000,000 based on the failure to obtain court approval for the Louisiana settlement." App., *infra*, 10a. There is no support for this position in the judgment. The punitive award, as the Mississippi Supreme Court concedes elsewhere in its decision, App., *infra*, 6a, was the product of Valley Forge's conduct in its entirety. It is troubling that the Mississippi Supreme Court engaged in its own fact-finding, allocated the punitive damages among the alleged wrongs, found

phrase "punish and deter," examined net worth, and imposed punitive damages (together with unprecedented conditional injunctive relief, *supra* p. 5). Without any sort of constraint or review at the trial court level, the Mississippi Supreme Court became the first, last, and only check on the discretion of the fact-finder.

The confusion flowing from Mississippi's amorphous standards governing imposition and review of punitive damages awards shows that Mississippi's scheme, unlike the Alabama system approved in *Haslip*, does not have meaningful constraints on the fact finder's discretion. The apparent tension between the Mississippi Supreme Court's view of the constitutionality of its punitive damages scheme in this case and in *Ivy*, as contrasted with the Court's comments and holding in *Haslip*, accentuates the necessity of review to clarify the appropriate limits on punitive damages awards required by the Constitution's Due Process Clause.

2. The $1,000,000 punitive damages award is so excessive in relation to Valley Forge's conduct and the harm caused thereby that it violates the substantive component of the Due Process Clause. *TXO* makes clear that the Fourteenth Amendment imposes substantive limits on the amount of punitive damages awards. 113 S. Ct. at 2719 (plurality opinion), 2725 (Kennedy, J., concurring), 2731 (O'Connor, J., dissenting). In rejecting a substantive due process challenge to a $10,000,000 punitive damages award based primarily on the wide ratio (526:1) between punitive and actual damages, the plurality of the Court in *TXO* held that the disparity between the amounts did not control in a case of that character. 113 S. Ct. at 2722. Specifically, though the difference between the $10,000,000 punitive damages and the $19,000 com-

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that the purported wrongs which formed the primary basis for the chancery court's punitive damages award were not "sufficiently culpable to justify punitive damages," App., *infra*, 13a, but left the $1,000,000 award intact.

pensatory damages was indeed "dramatic," the plurality looked to the magnitude of the potential harm or loss that would have occurred had the petitioner prevailed in the dispute, which, when considered, significantly reduced the ratio and dissipated the "shocking disparity." *Id.*

In addition, there was also evidence in the record establishing that TXO, rather than engaging in an isolated incident, acted out a malicious and fraudulent course of conduct involving slander of title which was part of a "larger pattern of fraud, trickery and deceit." 113 S. Ct. at 2722. This element of malice persuaded the plurality that the punitive damages in *TXO* were not so grossly excessive as to violate due process. 113 S. Ct. at 2722-23. Indeed, Justice Kennedy found that the "ample evidence" of malice made it "probable that the jury's verdict was motivated by a legitimate concern for punishing and deterring TXO, rather than by bias, passion, or prejudice." 113 S. Ct. 2726.

Although Valley Forge also faces a punitive award far disproportionate to the economic harm caused, Valley Forge's conduct was not malicious and there was proof at trial neither of catastrophic potential harm which could have resulted from Valley Forge's conduct in this particular case nor of similar conduct by Valley Forge in other cases showing a deliberate pattern and practice of wrongful conduct.

Implementing Mississippi's public policy of protecting minors, the chancellor found Valley Forge acted in bad faith by engaging in a practice of failing to obtain court approval of minors' claims, and by filing a frivolous subrogation suit, App., *infra*, 26a-28a. The chancellor stated that Valley Forge's conduct, in its totality, "easily meets the standard for imposition of punitive damages," and awarded $1,000,000 in unconditional punitive damages. App., *infra*, 28a-29a. The Mississippi Supreme Court, however, found that Valley Forge's failure to obtain court approval of the settlement of Tina Strickland's claim was

merely an "oversight" and was not in "callous disregard to the rights of another." App., *infra*, 6a. The court did not consider the evidence of any pattern and practice of Valley Forge with respect to the settlement of minors' claims. Rather, the court based its affirmance of the entire $1,000,000 punitive damages award by the chancery court on the filing of the declaratory action in this particular case. The Mississippi Supreme Court concluded that Valley Forge's filing of the declaratory judgment action was not technically "bad faith" as found by the chancellor, App., *infra*, 10a, but involved "gross negligence in filing and maintaining a groundless lawsuit," App., *infra*, 9a, a cause of action heretofore not recognized in Mississippi.[9] Thus, a punitive damages award originally based on the chancellor's finding that Valley Forge had engaged in a bad faith pattern and practice of avoiding court review of settlements with minors, calculated to allow Valley Forge to violate the rights of minors repeatedly in some undetermined number of settlements in at least two states, was affirmed on the basis that Valley Forge had acted negligently in taking an unsound legal position in one case involving $25,000. This case plainly does not involve the sort of culpable conduct, *TXO*, 113 S. Ct. at 2726 (Kennedy, J., concurring), exposure to potential harm in this case, *TXO*, 113 S. Ct.

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[9] The only recognized cause of action in Mississippi relating to improper filing of a lawsuit is the intentional tort of malicious prosecution, which requires a finding of malice. *See Henry v. First Nat'l Bank of Clarksdale*, 444 F.2d 1300, 1310 (5th Cir. 1971). Indeed, Valley Forge had no notice that the filing of a declaratory aciton would give rise to a punitive damages award, as Mississippi precedent had recognized that filing a declaratory complaint to resolve a legal issue is an act of good faith, not bad faith, even if the issue is resolved against the insurer. *See Employers Mutual Casualty Co. v. Tompkins*, 490 So. 2d 897, 905 (Miss. 1986); *Dunn v. State Farm Fire & Casualty Co.*, 927 F.2d 869, 874 (5th Cir. 1991) ("For requiring the resolution of the legal issue [the insurer] cannot be liable under Mississippi law for punitive damages even if it does not prevail on the underlying legal issue.").

at 2722, or showing of a pattern of wrongful conduct, *id.*, that could justify an award of punitive damages so grossly disproportionate to the actual damages in this case.

Indeed, neither the chancellor nor the Mississippi Supreme Court in this case articulated the precise harm caused by Valley Forge's filing of a meritless declaratory judgment action. While the chancellor dwelled on the potential harm of failing to get court approval of a settlement, App., *infra*, 26a-27a, that was not relevant to the Mississippi Supreme Court's decision. The Mississippi Supreme Court only noted briefly in passing that the filing of the suit resulted in Tina Strickland losing the use of needed funds such that Tina "unquestionably suffer[ed] serious damages," but did not state what those damages were. App., *infra*, 9a. The amounts awarded in actual damages below do not reflect "serious damages" which could justify a $1,000,000 punitive damages award. At most, the only harm to Tina Strickland caused by Valley Forge's decision to file a declaratory judgment action was the delay in receiving the $25,000 policy proceeds and the attorneys' fees incurred in the litigation. The chancellor awarded interest on the $25,000 limits, which amounts to less than $4,000, and $30,000 in attorneys' fees. This total bears no rational relationship to the $1,000,000 punitive damages award.

The Mississippi Supreme Court affirmed the entire $1,000,000 unconditional punitive damages award of the chancery court despite the change in the basis of Valley Forge's liability from "bad faith" to "negligence," and the change in the conduct on which the award was based from a calculated, bad faith, multi-state course of conduct affecting multiple victims to conduct in connection with one $25,000 case. When the same punitive damages award is appropriate regardless of the conduct or cause of action giving rise to it, or the harm caused thereby, it is necessarily a product of a scheme that both lacks procedures to ensure fair results and encourages arbitrary and

unpredictable deprivations of property. This is therefore a compelling case for this Court to further articulate the appropriate procedural and substantive limitations the Due Process Clause imposes on punitive damages.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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